No. 4083. AT LAW.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA, ex. rel., Thomas W. Miller, Alien Property Custodian of the United States of America,
Plaintiff and Relator in Error.

—VS.—

C. W. CLAUSEN, State Auditor of the State of Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR IN ERROR

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STATEMENT OF THE CASE

In the year 1922, THOMAS W. MILLER, Alien Property Custodian of the United States of America, who is the plaintiff and relator in this action, filed a suit in equity in the U. S. District Court for

the Western Dstrict of Washington, Southern Division, against the officers of the Department of Labor and Industries of the State of Washington for the purpose of gaining possession of certain warrants on the "Accident Fund" of the State of Washington which had been regularly drawn in the name of certain alien enemies of the United States placed in the custody of such officers but not delivered to the payees at the time the United States entered the World War and at the time that the "Trading with the Enemy Act" was passed and also for the purpose of securing certain voucher or vouchers to be drawn by the officers of the Department of Labor and Industries of the State of Washington against the "Accident Fund," so-called, and upon the State Auditor of the State of Washington for certain claims all of which had been regularly and duly allowed against the said "Accident Fund" in favor of the said alien enemies.

A list of which alien enemies and the amount due each is contained in "Exhibit A" which is attached to the Petition and Affidavit in this action, but which is not printed in the record.

All these claims had been regularly reported to the Alien Property Custodian of the United States either by the officers of the present Department of

Labor and Industries or their predecessors the Industrial Insurance Commission of the State of Washington soon after the United States became involved in the World War and long before the Treaty of Peace had been signed ending the war and a demand thereupon made by the Alien Property Custodian of the United States for the funds represented thereby, he having after investigation found such sums to be alien owned, (see *Clifford v. Miller*, 288 Federal Reporter, page 537); this action resulted in favor of the Custodian and was appealed to this court and affirmed in the above designated case.

Upon the remittitur of the Circuit Court of Appeals being filed and entered by direction of the District Judge, the Department of Labor and Industries delivered to the Custodian the warrants involved in the said action and issued to him one voucher for $24,348 against the Accident Fund upon the Auditor of the State of Washington in the payment of the claims for which no warrants had been drawn, directing the said defendant and respondent above named as State Auditor of the State of Washington to audit the said claims and issue to Thomas W. Miller, Alien Property Custodian of the United States of America, a warrant

against the "Accident Fund" of the State of Washington in the sum of $24,348 in payment of the said claims; upon the receipt of the said voucher, the Custodian presented the same to the defendant and respondent as State Auditor at his office at Olympia, Washington, and demanded that he audit the same and issue to him a warrant upon the "Accident Fund" for the amount called for in said voucher and as provided therein. On advice of the Attorney General, who represented the Appellee, in the case above mentioned and who is also the representative of the defendant and respondent herein, the defendant and respondent refused to audit the claims or issue the warrant.

The voucher is in due form and follows the rules and practices of the Department of Labor and Industries (Paragraph IV of Complaint).

Upon the refusal of the defendant and respondent to audit the said voucher and to issue the said warrant the planitiff and relator above named brought this action of mandamus against the defendant and respondent, secured an Order for an Alternative Writ of Mandamus and an Alternative Writ of Mandamus, which were made returnable before the said District Court (Order granting Alternative Writ of Mandamus and Alternative Writ of Mandamus).

Upon the return day of the Writ, the respondent appeared and demurred to the Petition and Affidavit of the relator, claiming that the court did not have jurisdiction of the persons of the defendant or the subject matter of the action and that said Petition and Affidavit did not state facts sufficient to constitute a cause of action against the defendant and respondent; upon argument before the court the demurrer was sustained solely upon the grounds that the court did not have jurisdiction of the subject matter of the action (Opinion of the Court); upon the rendition of said decision the plaintiff and relator refusing to plead further, the court entered a judgment dismissing the said case for want of jurisdiction (Judgment of Dismissal), to which judgment of Dismissal the plaintiff excepted and his exception was duly allowed (Order of Dismissal); upon the entry of said judgment the plaintiff and relator sued out this Writ of Error, alleging as error the three grounds set forth in his Assignment of Error (Assignments of Error).

The Alien Property Custodian requires the warrant in question that he may collect the amount thereof from the Custodian of the "Accident Fund" and distribute the same to those who by act of Congress may be entitled thereto, for the purpose of carrying out the Treaty obligations of the United

States with the foreign governments of whom such alien enemies are subjects.

The sole question involved in this case is whether or not the action is against the State of Washington, and if so, can it be brought in the said District Court or must the plaintiff and relator apply for his relief to the Supreme Court of the United States.

SPECIFICATIONS OF ERROR.

I.

The United States District Court erred in holding that it did not have jurisdiction of the defendant and respondent and of the subject matter of the action and in sustaining the demurrer of the defendant and respondent to the petition and affidavit of the plaintiff and relator.

II.

The Court erred in entering judgment in favor of the defendant and respondent and against the plaintiff and relator for lack of jurisdiction.

III.

The Court erred in not granting plaintiff and relator a peremptory Writ of Mandamus against the defendant and respondent upon the return made to the Alternative Writ issued in said action.

ARGUMENT.

I.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION AND THE DEMURRER WAS ERRONEOUSLY SUSTAINED.

THE PRESENT ACTION IS NOT ONE AGAINST THE STATE OF WASHINGTON.

In a decision rendered by this court on the 14th day of March last in the case of *Clifford, Superintendent of the Department of Labor and Industries et al. v. Thomas W. Miller, Alien Property Custodian,* 288 Fed. 537, the plaintiff and relator herein was given judgment by the terms of which he was awarded a voucher upon C. W. Clausen, State Auditor of the State of Washington, defendant and respondent herein, for the sum of $24,348 in payment of certain claims set forth in said voucher. This voucher was issued in compliance with the judgment and is in due form. The present action was brought solely for the purpose of requiring the auditor to issue to the Alien Property Custodian a warrant aganist the Accident Fund for the payment of said claims in compliance with this voucher. This Court in its opinion clearly set forth the principal provisions of the Workmen's Compensation

Law and the duties of the Department of Labor and Industries of the State of Washington and the State Auditor of the State of Washington in reference thereto. Speaking for the court, Justice Rudkin in this opinion says:

> "Speaking generally, the Workmen's Compensation Act of the State of Washington (Rem. Code 1915, pp. 6604-1 to 6604-32) abolishes civil actions and civil causes of action as between employer and employee, in certain cases, and substitutes a system of compensation in their place. On or before January 15th of each year employers engaged in employments classed as extra hazardous are required to pay into the accident fund in the state treasury a fixed percentage of their total pay roll of that year, and a schedule of awards for injured employees, or their dependents, in case of death, is provided, payable from the accident fund. A department for the administration of the act is created, and claims for compensation must be filed with the department within one year. All claims thus presented are examined by the department, and a court review is provided for. Disbursements out of the accident fund can only be made upon warrants drawn by the State Auditor upon vouchers therefor transmitted to him by the department and audited by him. Such warrants are paid by the State Treasurer out of the accident fund upon which they are drawn. Rem. Code 6604-1 et seq."

Then after quoting from several decisions of the United States Supreme Court, the matter is summed up as follows: *"Measured by these rules the present suit is not an action against the state."* *Clifford et al. v. Miller*, 288 Fed. 537.

II.

THE ACTION OF MANDAMUS IS RECOGNIZED BY BOTH STATE AND FEDERAL COURTS AS THE PROPER REMEDY TO COMPEL AN EXECUTIVE OFFICER AS AN AUDITOR TO ISSUE A WARRANT UPON A VOUCHER REGULARLY ISSUED TO HIM BY AN ADMINISTRATIVE OFFICER OR DEPARTMENT.

The leading text writers sustain this principle; Ruling Case Law, vol. 18, sec. 114. The same authority states that mandamus is the usual remedy to compel the drawing of municipal warrants; Ruling Case Law, vol. 18, sec. 148. The decisions of the Supreme Court of the State of Washington adhere to the same principle.

Abernethy v. *Town of Medical Lake*, 9 Wash. 112, holds that even if the warrant is issued the municipality can not be sued directly, but mandamus must be maintained for its payment.

State of Washington on the relation of *H. A. Porter* v. *T. E. Headlee, County Auditor*, 19 Wash. 477, holds that mandamus is the proper remedy to compel the issuance of a warrant.

J. Haddock Smith v. *Norris Ormsby et al.*, 20 Wash. 396, holds that where the right to a warrant has been determined by a court that the auditor has no authority to question it and can not refuse to issue it and in the case in question the auditor was not a party to the original action.

In the case of *American Bridge Company* v. *Wheeler*, 35 Wash. 40, the auditor was mandamused to issue a warrant and it was contended that the county was a necessary party and the county commissioners must be joined in the action. The Supreme Court held otherwise.

In the case of *State ex rel. Maddaugh* v. *Ritter*, 74 Wash. 649, the Supreme Court of the State of Washington held that where a claim had been allowed by the city council that the act of the mayor in signing the warrant and issuing it was a mere ministerial act.

In the case of the *State of Washington ex rel. Beach* v. *Andrew Oleson*, 91 Wash. 56, the Supreme Court held that the action of a county audi-

tor in issuing a warrant upon a voucher for a claim that had been allowed by the county commissioners was a mere ministerial act and he could be compelled by mandamus to issue it.

In the case of *Savage* v. *Sternberg*, 19 Wash. 679, 67 A. S. R. 751, an action was brought to collect certain warrants which had been duly and regularly issued and the treasurer was mandamused for that purpose. It was contended that this was an action against the city and the city was a necessary party defendant, and an application was made to make the City of Tacoma a party defendant. This was denied for the reason that the action was not one against the city.

Perhaps the clearest exposition on the subject by the Supreme Court of the State of Washington is the case of *The State ex rel. Gillette* v. *C. W. Clausen, State Auditor*, 44 Wash. 437, wherein the auditor as in this case attempted to exercise administrative powers and refused to issue a warrant upon a voucher for a claim that had been regularly passed upon by the Railroad Commissioners. The court compelled him to issue the warrant upon the voucher of the Railroad Commissioners.

The Accident Fund is under the absolute control of the Department of Labor and Industries, as

was stated by this court in the Clifford case. The State Auditor when it comes to the administration of this fund simply acts in a ministerial capacity.

The other state courts have likewise held that the issuance of a warrant by an auditor under the circumstances like that involved in this case was ministerial and that such actions are not against the state.

State v. *Toole*, 226 Montana 22, 91 A. S. R. 388. In a note by the editors of the American State Reports annotating the case of *Ward* v. *the Commissioners of Beauford County* (N. C.), 125 A. S. R. 520, the annotater says, "Where the statutes prescribe the amount of the claim so that it is a definitely ascertained demand, the auditing of the demand and the issuance of the warrant for the same is regarded as a ministerial duty even though some degree of discretion is exercised in the matter." A large number of cases are cited in this note, including that of *Roberts* v. *United States*, 176 U. S. 221, 20 Supreme Court Reports 376, 44 L. Ed. 443. Other cases bearing upon this question were cited in the opinion in the Clifford case, including *The Board of Liquidation et al.* v. *McComb*, 92 U. S. 534, 541, 23 L. Ed. 623; *Virginia Coupon Cases*, 114 U. S. 270, 293, 5 Supt. Ct. 903,

915, 29 L. Ed. 185; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699, 701 (35 L. Ed. 363); *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390, 411, 7 Sup. Ct. 599, 610, 30 L. Ed. 721. The principles announced in the case of *Roberts* v. *U. S.*, 176 U. S. 221, are most applicable to the present case. The court states them clearly as follows:

> "Unless the writ of mandamus is to become practicaly valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly

> devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The former decision of this court granting plaintiff and relator a voucher upon the Auditor of the State of Washington becomes an absolute nullity if the Auditor can set himself up as a dictator and claim that it is his duty to refuse to issue warrants for claims that have been duly passed upon by the Department of Labor and Industries and which he has been ordered to recognize. It is well said in the above decision that every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it and when his refusal is brought before the court he might successfully plead that the performance of duty involved the construction of a statute by him, and

therefore it was not ministerial and the court would on that account be powerless to give relief.

III.

THE DISTRICT COURT BY ITS DECISION IN SUSTAINING THE DEMURRER OF THE DEFENDANT AND RESPONDENT TO PLAINTIFF AND RELATOR TO PLAINTIFF'S PETITION AND AFFIDAVIT HAS NOT ONLY REVERSED THE DECISION OF THE CIRCUIT COURT OF APPEALS RENDERED IN THE CASE OF CLIFFORD V. MILLER, 288 FED. 537, BUT IT HAS REVERSED ITSELF.

It is an absurd contention that the plaintiff and relator herein were entitled to a voucher or vouchers upon the State Auditor for a warrant or warrants for the claims in question and that he was not entitled to have a warrant issued upon such voucher. Until this warrant is secured he is in no position to collect the funds represented thereby in any court in any jurisdiction. On this account the case of *Lankford* v. *Platte Iron Works*, 235 U. S. 461, has no application. The Washington statutes give to the Department of Labor and Industries large discretion, but gives little if any to the State Auditor where claims have been allowed and vouchers issued.

IV.

EVERY FEATURE OF THE TRADING WITH THE ENEMY ACT INVOLVED IN THIS CASE HAS BEEN CONSTRUED AND UPHELD BY THE SUPREME COURT OF THE UNITED STATES.

Central Union Trust Co v. *Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. 403; *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 214, 65 L. Ed. 604; *Simon* v. *American Exchange Bank*, 258 U. S. —, 43 Sup. Ct. 165, 67 L. Ed. — (decided in December 1922). See, also, *American Exchange Bank* v. *Garvan* (C. C. A.), 273 Fed. 43; *Columbia Brewing Co.* v. *Miller* (C. C. A.), 281 Fed. 289; In re *Miller* (C. C. A.), 281 Fed. 764; *Commercial Trust Company of New Jersey* v. *Thomas W. Miller, Alien Property Custodian*, the United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 542 to 546; the *U. S. Trust Company of New York et al.* v. *Thomas W. Miller, Alien Property Custodian*, United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 545 to 546; *Charles J. Ahrenfeldt v. Thomas W. Miller, Alien Property Custodian*, United States Supreme Court Advance Opinions No. 14, May 15, 1923, page 546.

V.

THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT ARE STILL IN EFFECT AND THE RIGHTS OF THE CUSTODIAN IN THIS ACTION ARE JUST THE SAME AS THOUGH THE UNITED STATES WERE AT THIS TIME INVOLVED IN WAR.

Commercial Trust Company of New Jersey v. *Thomas W. Miller, Alien Property Custodian*, United States Supreme Court Advance Opinions No. 14, May 15, 1923, pages 542 to 546. This decision holds that the war power exercised under the Trading With the Enemy Act is legislative, "A court can not estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States until such time as the Imperial German Government * *

shall have * * * made suitable provisions for the satisfaction of all claims. *Kahn* v. *Anderson*, 255 U. S. 1, 65 L. Ed. 469, 41 Sup. Ct. Rep. 224, and *Vincenti* v. *United States* (C. C. A.), 272 Fed. 114 and 256 U. S. 700, 65 L. Ed. 1178, 41 Sup. Ct. Rep. 538."

VI.

THE ALIEN PROPERTY CUSTODIAN BECAME VESTED WITH THE TITLE TO ALL SUMS REPRESENTED BY THE CLAIMS DESCRIBED IN THE VOUCHER FOR WHICH A WARRANT HAS BEEN DEMANDED IN THIS ACTION AT THE TIME OF THE DEMAND.

The title to the reserve accident fund which had been set apart for the payment of these claims for which the voucher was issued vested in the Alien Property Custodian early in the year 1918. This was before any of the parties had died as shown by the voucher (if that is of any consequence).

Kohn v. *Kohn*, 264 Fed. 253;
Miller v. *Camp*, 286 Fed. 520;
In re *Miller*, 281 Fed. 762;
Garvan v. *$20,000 Bonds*, 265 Fed. 477.

VII.

THE TRADING WITH THE ENEMY ACT IS A WAR MEASURE AND THE PROCEEDINGS WHICH THE ALIEN PROPERTY CUSTODIAN INSTITUTED ARE ON ACCOUNT OF A LEGISLATIVE ENACTMENT UNDER THE WAR POWER OF CONGRESS.

The act provides "The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the act of March third, nineteen hundred and eleven, entitled 'An act to codify, revise, and amend the laws, relating to the judiciary.'" Section 3115½, Trading with the Enemy Act. The act also applies to a body politic, viz., a state.

With this section in force the Alien Property Custodian is required to seek his relief in the District Courts of the United States.

VIII.

THE PRESENT ACTION IS ONE ARISING UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER A LAW OF CONGRESS. IT IS ONE IN WHICH THE UNITED STATES SUPREME COURT HAS NOT EXCLUSIVE ORIGINAL JURISDICTION, BUT ONLY APPELLATE JURISDICTION.

Numerous well considered decisions of the Supreme court clearly recognize this.

Cohens v. *Virginia*, 6 Wheaton 393;

Ames v. *Kansas*, 111 U. S. 462, 28 L. Ed. 487;

Börs v. *Preston*, 111 U. S. 250, 28 L. Ed. 419.

IX.

THE PRESENT ACTION IS SIMPLY ANCILLARY TO THAT OF CLIFFORD VS. MILLER ABOVE CITED.

It is brought for the purpose of carrying into effect the judgment in the other case. Without the warrant authorized by the voucher which was awarded the appellant in the Clifford case, the voucher will be of no effect.

Gunter v. *Atlantic Coast Line R. Company*,

200 U. S. 273, 4, 50 L. Ed. 478.

In conclusion we urge that the appellant is entitled to the warrant asked for in his petition for the following reasons:

First: The possession of the fund represented belongs to the Alien Property Custodian of the United States for the purpose of carrying out the acts of Congress.

Second: The action of the Auditor in withholding the warrant from the appellant is arbitrary and is a violation both of the civil and criminal sections of the Trading with the Enemy Act.

Third: The United States District Courts are especially authorized to make all rules, orders, and decisions necessary to carry into effect the act.

Fourth: The action of the defendant is interfering with the carrying out of the treaty obligations of the government by the President of the United States and is interfering with the valid right of the Custodian which he is exercising under the provisions of the Constitution of the United States and the Trading with the Enemy Act passed by Congress for the purpose of putting into effect those constitutional provisions. In the former case

the present Attorney General of the State of Washington appeared and demurred and by his demurrer confessed that the Auditor of the State of Washington was ready and willing to issue the warrant now demanded by the Custodian. He now appears for the State Auditor and upon his advice the Auditor refuses to issue the warrant.

We submit that the action of the state authorities in this matter is unjustifiable from any standpoint. Instead of cooperating and aiding the Custodian in the difficult task of carrying out the reconstruction measures following the great war, they appear and by technical questions of jurisdiction seek to interfere with him and prevent him from carrying out the wish of the President of the United States in making the adjustments and settlements with the foreign governments whose subjects are claimants in the said voucher.

The only return which was made to plaintiff's alternative writ of mandamus was a demurrer which does not question the right of the Custodian to the funds, but simply claims that he did not proceed before the proper tribunal.

In the circumstances we submit that this case should be reversed, with instructions to the District

Court to grant to the plaintiff and relator a peremptory writ for said warrant.

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